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employee's possession which the employee should have known to be material; or

(c) The employee accepted a payment, which the employee knew or should have known to be erroneous.

(2) Every case must be examined in light of its particular facts. For example, where an employee is promoted to a higher grade but the step level for the employee's new grade is miscalculated, it may be appropriate to conclude that there is no fault on the employee's part because employees are not typically expected to be aware of and understand the rules regarding determination of step level upon promotion. On the other hand, a different conclusion as to fault potentially may be reached if the employee in question is a personnel specialist or an attorney who concentrates on personnel law.

b. If the deciding official finds an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim, then the request for a waiver must be denied.

c. If the deciding official finds no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim, the employee is *not* automatically entitled to a waiver. Before a waiver can be granted, the deciding official must also determine that collection of the claim against an employee would be against equity and good conscience and not in the best interests of the United States. Factors to consider when determining if collection of a claim against an employee would be against equity and good conscience and not in the best interests of the United States include, but are not limited to:

(1) Whether collection of the claim would cause serious financial hardship to the employee from whom collection is sought.

(2) Whether, because of the erroneous payment, the employee either has relinquished a valuable right or changed positions for the worse, regardless of the employee's financial circumstances.

(a) To establish that a valuable right has been relinquished, it must be shown that the right was, in fact, valuable; that it cannot be regained; and that the action was based chiefly or solely on reliance on the overpayment.

(b) To establish that the employee's position has changed for the worse, it must be shown that the decision would not have been made but for the overpayment, and that the decision resulted in a loss.

(c) An example of a "detrimental reliance" would be a decision to sign a lease for a more expensive apartment based chiefly or solely upon reliance on an erroneous calculation of salary, and the funds spent for rent cannot be recovered.

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(3) The cost of collecting the claim equals or exceeds the amount of the claim;

(4) The time elapsed between the erroneous payment and discovery of the error and notification of the employee;

(5) Whether failure to make restitution would result in unfair gain to the employee;

(6) Whether recovery of the claim would be unconscionable under the circumstances.

d. The burden is on the employee to demonstrate that collection of the claim would be against equity and good conscience and not in the best interest of the United States.

10. Authorities

a. 5 U.S.C. §5584, "Claims for Overpayment of Pay and Allowances, and of Travel, Transportation and Relocation Expenses and Allowances."

b. 31 U.S.C. §3711, "Collection and Compromise."

c. 31 U.S.C. §3716, "Administrative Offset."

d. 31 U.S.C. §3717, "Interest and Penalty on Claims."

e. 5 CFR Part 550, subpart K, "Collection by Offset from Indebted Government Employees."

f. 31 CFR Part 5, subpart B, "Salary Offset."

g. Determination with Respect to Transfer of Functions Pursuant to Public Law 104-316, OMB, December 17, 1996.

11. Cancellation

TD 34-01, "Waiver of Claims for Erroneous Payments," dated October 25, 1995, is superseded.

12. Office of Primary Interest

Office of Accounting and Internal Control.

PART 6—APPLICATIONS FOR AWARDS UNDER THE EQUAL ACCESS TO JUSTICE ACT

Subpart A—General Provisions

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AUTHORITY: Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 (5 U.S.C. 504(c)(1)).

SOURCE: 47 FR 20765, May 14, 1982, unless otherwise noted.

Subpart A—General Provisions

§ 6.1 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (called “the Act” in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called “adversary adjudications”) before agencies of the Government of the United States. An eligible party may receive an award when it prevails over an agency, unless the agency’s position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Treasury Department will use to make them.

§ 6.2 When the Act applies.

The Act applies to any adversary adjudication pending before an agency at any time between October 1, 1981 and September 30, 1984. This includes proceedings begun before October 1, 1981, if final agency action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were initiated or when final agency action occurs.

§ 6.3 Proceedings covered.

The Act applies to adversary adjudications required to be conducted by the Treasury Department under 5 U.S.C. 554. Within the Treasury Department, these proceedings are:

- (a) Bureau of Alcohol, Tobacco and Firearms: (1) Permit proceedings under the Federal Alcohol Administration

Act (27 U.S.C. 204); (2) Permit proceedings under the Internal Revenue Code of 1954 (26 U.S.C. 5171, 5271, 5713); (3) License and permit proceedings under the Federal Explosives Laws (18 U.S.C. 843).

- (b) Comptroller of the Currency:

All proceedings conducted under 12 CFR part 19, subpart A.

§ 6.4 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term “party” is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and has complied with the requirements in Subpart B of this part.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than \$1 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than \$5 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141(a)) with not more than 500 employees, or

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than \$5 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an “individual” rather than a “sole owner of an unincorporated business” if the matter in controversy is primarily related to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the

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applicant, under the applicant's direction and control. Part-time employees shall be included.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual or group of individuals, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares of another business, or controls in any manner the election of a majority of that business's board of directors, trustees, or other persons exercising similar functions, will be considered an affiliate of that business for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

§6.5 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with the *final* disposition of a proceeding, unless (1) the position of the agency was substantially justified, or (2) special circumstances make the award unjust. No presumption arises that the agency's position was not substantially justified simply because the agency did not prevail.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

§6.6 Allowable fees and other expenses.

(a) The following fees and other expenses are allowable under the Act:

(1) Reasonable expenses of expert witnesses;

(2) Reasonable cost of any study, analysis, engineering report, test, or project which the agency finds necessary for the preparation of the party's case;

(3) Reasonable attorney or agent fees.

(b) The amount of fees awarded will be based upon the prevailing market rates for the kind and quality of services furnished, except that

(1) Compensation for an expert witness will not exceed the highest rate paid by the agency for expert witnesses; and

(2) Attorney or agent fees will not be in excess of \$75 per hour.

§6.7 Delegations of authority.

The Director, Bureau of Alcohol, Tobacco and Firearms and the Comptroller of the Currency are authorized to take final action on matters pertaining to the Equal Access to Justice Act, 5 U.S.C. 504, in proceedings listed in §6.3 under the respective bureau or office. The Secretary of the Treasury may by order delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases to other subordinate officials.

Subpart B—Information Required From Applicants

§6.8 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the agency in the proceeding that the applicant alleges was not substantially justified. The application shall state the basis for the applicant's belief that the position was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed \$1 million (if an individual) or \$5 million (for all other applicants, including their affiliates).

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However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall itemize the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes the agency to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer with respect to the eligibility of the applicant and by the attorney of the applicant with respect to fees and expenses sought. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

(Approved by the Office of Management and Budget under control number 1512-0444, for applications filed with the Bureau of Alcohol, Tobacco and Firearms)

(5 U.S.C. 552(a) (80 Stat. 383, as amended))

[47 FR 20765, May 14, 1982, as amended at 49 FR 14944, Apr. 16, 1984]

§6.9 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization, or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in §6.4(f)) when the proceeding was initiated. In the case of national banking associations, "net worth" shall be considered to be the total capital and surplus as reported, in conformity with the applicable instructions and guidelines, on the bank's last Consolidated Report of Con-

dition filed before the initiation of the underlying proceeding.

(b) The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

§6.10 Documentation of fees and expenses.

(a) The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, engineering report, test, or project, for which an award is sought.

(b) The documentation shall include an affidavit from any attorney, agent, or expert witness representing or appearing in behalf of the party, stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed.

(1) The affidavit shall state the services performed. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.

(2) If not hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide information about two attorneys or agents with similar experience, who perform similar work, stating their hourly rate.

(c) The documentation shall also include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided.

(d) The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§6.11 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the

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proceeding but in no case later than 30 days after the agency's final disposition of the proceeding.

(b) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

Subpart C—Procedures for Considering Applications

§ 6.12 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding.

§ 6.13 Answer to application.

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought shall file an answer to the application.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 60 days and further extensions may be granted by the adjudicative officer upon request by agency counsel and the applicant.

(c) The answer shall explain any objections to the award requested and identify the facts relied on in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer supporting affidavits.

§ 6.14 Decision.

The adjudicative officer shall issue an initial decision on the application within 60 days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue,

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findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

§ 6.15 Agency review.

Either the applicant or agency counsel may seek review of the initial decision on the fee application, or the agency may decide to review the decision on its own initiative. If neither the applicant nor agency counsel seeks a review and the agency does not take review on its own initiative, the initial decision on the application shall become a final decision of the agency 30 days after it is issued. Whether to review a decision is a matter within the discretion of the agency. If review is taken, the agency will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.

§ 6.16 Judicial review.

Judicial review of final agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 6.17 Payment of award.

An applicant seeking payment of an award shall submit to the agency a copy of the agency's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. An applicant shall be paid the amount awarded unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

PART 7—EMPLOYEE INVENTIONS

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AUTHORITY: 80 Stat. 379; 5 U.S.C. 301, sec. 6, E.O. 10096; 3 CFR, 1949–1953 Comp., p. 292, as amended by E.O. 10930; 3 CFR, 1959–1963 Comp., p. 456.